AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

**Department of Transportation v. Association of American Railroads, \_ U.S. \_** (2015)

*In 1970, Congress created the National Railroad Passenger Corporation (Amtrak) to operate a passenger railroad system. In 2008, Congress gave Amtrak and the Federal Railroad Administration (FRA) joint authority to issue “metrics and standards” regarding the performance of passenger railroad service. If those two entities disagree on what metrics and standards to adopt, the disagreement is to be resolved by the appointment of an arbitrator. Among the standards to be issued was one addressing train delays caused by host railroads (the owners of the tracks on which Amtrak operates).*

*The Association of American Railroads, which represented the host railroads, filed suit in federal district court to block the new regulations. The suit argued that Congress could not constitutionally empower a private entity to exercise such regulatory authority. The district court ruled in favor of the government, but the circuit court reversed, holding that Congress had unconstitutionally delegated legislative power to a private corporation. The government appealed to the U.S. Supreme Court, which unanimously held that Amtrak was, for constitutional purposes, a governmental entity that could be vested with regulatory authority by Congress.*

JUSTICE KENNEDY delivered the opinion of the Court.

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In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards – authority it described as “regulatory power” – the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court’s analysis treated as controlling Congress’ statutory command that Amtrak “is not a department, agency, or instrumentality of the United States Government.” . . .

. . . . Congressional pronouncements, though instructive as to matters within Congress’ authority to address, are not dispositive of Amtrak’s status as a governmental entity for purposes of separation of powers analysis under the Constitution. . . .

It is appropriate to begin with Amtrak’s ownership and corporate structure. The Secretary of Transportation holds all of Amtrak’s preferred stock and most of its common stock. Amtrak’s Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. . . . Amtrak’s Board members are subject to salary limits set by Congress; and the Executive Branch has concluded that all appointed Board members are removable by the President without cause.

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In addition to controlling Amtrak’s stock and Board of Directors, the political branches exercise substantial, statutorily mandated supervision over Amtrak’s priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route-specific ridership and on-time performance. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a “designated Federal entity,” Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak’s budget, routes, and prices. . . .

It is significant that, rather than advancing its own economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. . . .

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Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. . . . Amtrak was created by the Government, is controlled by the Government, and operates for the Government’s benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution’s separation of powers provisions. . . .

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[F]or purposes of Amtrak’s status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress’ disclaimer of Amtrak’s governmental status. . . .

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*Vacated and remanded*.

JUSTICE ALITO, concurring.

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. . . . One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress “sponsor[s] corporations that it specifically designate[s] not to be agencies or establishments of the United States Government.”

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

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Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise special power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.

Here, respondent tells the Court that “Amtrak’s board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority.” The Government says not a word in response. . . . Because Amtrak is the Government, those who run it need to satisfy basic constitutional requirements.

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. . . . In one statute, Congress says Amtrak is not an “agency.” But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D.C. Circuit ruled as it did.

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The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. . . .

Of course, this Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman v. American Trucking Associations, Inc*. (2001). But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution. . . .

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with “legislative Powers.” Nor are they vested with the “executive Power,” which belongs to the President. . . . By any measure, handing off regulatory power to a private entity is “legislative delegation in its most obnoxious form.” *Carter v. Carter Coal Co*. (1936).

For these reasons, it is hard to imagine how delegating “binding” tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term “arbitrator” refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated. . . .

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Finally, the Board of Amtrak, and, in particular, Amtrak’s president, also poses difficult constitutional problems. . . . [U]nlike everyone else on the Board, Amtrak’s president has not been appointed by the President and confirmed by the Senate.

[A]ccountability demands that principal officers be appointed by the President. The President, after all, must have “the general administrative control of those executing the laws” *Myers v. United States* (1926), and this principal applies with special force to those who can “exercis[e] significant authority” without direct supervision. . . .

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In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. . . .

JUSTICE THOMAS, concurring.

We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law, our primary question . . . is whether the market participant is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom.

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When the Court speaks of Congress improperly delegating power, what it means is Congress’ authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly “delegates” legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power. It also improperly “delegates” legislative power to itself when it authorizes itself to act without bicameralism and presentment. And Congress improperly “delegates” . . . executive power when it authorizes individuals or groups outside of the President’s control to perform a function that requires the exercise of that power.

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The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

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We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, but it has become increasingly clear to me that the test we have applied to distinguish legislative power from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statutes sets out “an intelligible principle” to guide the rulemaker’s discretion. Although the Court may never have intended the boundless standard the “intelligible principle” test has become, it is evident that it does not adequately reinforce the Constitution’s allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.

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Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called “private nondelegation doctrine” flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clause would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the “private nondelegation doctrine” is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether government or private.

For this reason, a conclusion that Amtrak is private – that is, not part of the Government at all – would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true. A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that “was created by the Government, is controlled by the Government, and operates for the Government’s benefit,” but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegate of that power than is a purely private one. To its credit, the majority does not hold otherwise. . . .

The first step in the Court of Appeals’ analysis on remand should be to classify the power that section 207 purports to authorize Amtrak to exercise. The second step should be to determine whether the Constitution’s requirements for the exercise of that power have been satisfied.

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. . . . We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.